No. 93-2044

Supreme Court, U.S.
FILED
JUL 20 1994
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

SHERMAN L. SHAW,

Petitioner,

v.

FRANK W. MASTERS, DAVID W. ROBINSON, GENE ARTHUR BUDIG, JOHN C. McFADDEN, THE UNIVERSITY OF KANSAS MEDICAL CENTER, and FRED ALLENBRAND, as Sheriff of Johnson County,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENTS MASTERS, ROBINSON, BUDIG AND McFADDEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are individual state employees immune under the Eleventh Amendment to the United States Constitution from actions under 42 U.S.C. § 1983 when they are sued in their official capacity and there is no evidence that they had any personal contact with the petitioner?

2. Is petitioner's claim barred by the statute of limitations?

PARTIES TO THE PROCEEDINGS

The parties are correctly shown in the caption to the case shown on the cover of this brief.

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinions below were unpublished. The opinion, entered on June 29, 1993, by the United States District Court for the District of Kansas was accurately reproduced in petitioner's Supplemental Petition except for the addition of hyphens and certain adjustments made by Shaw to paragraphs. These changes, however, do not materially alter the decision. The opinion of the 10th Circuit Court of Appeals is attached as Appendix A.

JURISDICTION

Jurisdiction in the district court was federal question jurisdiction. 28 U.S.C. § 1331. Jurisdiction before this court is pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usuage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding forredress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be

considered to be a statute of the District of Columbia.

K.S.A. 1993 Supp. 60-513(a):

> Actions limited to two years.
> (a) The following actions shall be brought within two years:
> . . .
> (4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

STATEMENT OF THE CASE

Petitioner Sherman L. Shaw has appeared pro se throughout this case. On November 17, 1989 Shaw suffered burns when his Dodge van caught fire and a gallon can of 190% alcohol "spewed" over his clothes and body. He was transported from the location of the fire in Kansas City, Missouri to the burn unit at the University of Kansas Medical Center in Kansas City, Kansas. On December 12, 1989 surgery was performed to graft skin onto Shaw's arms and legs.

Shaw contends, during the December 12, 1989 operation, an electronic device was

implanted in his leg. Shaw believes this device was implanted to permit someone or some agency to monitor his movements. In his Petition for a Writ of Certiorari, Shaw for the first time expands his complaint to contend he has also recently discovered a radio receiver implanted in his brain. (Petition for Writ of Certiorari, p. 6.)

Shaw filed his claim initially on December 12, 1991 in the United States District Court for the Western District of Missouri naming numerous defendants.[1] The action was brought under 42 U.S.C. § 1983 for deprivation of various constitutional rights. The defendants were sued "[I]n

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[1]The named defendants included Gene Budig, the Chancellor of the University of Kansas, Roger N. Bise, D.D.S., M.D., Robert A. Boraz, D.D.S., Frank W. Masters, David W. Robinson, M.D., Mani M. Mani, M.D., Glen Potter, the Administrator of the University of Kansas Medical Center, Charles Norris, M.D., the Chief of Staff of the University of Kansas Medical Center, and Laurence Cheung, who plaintiff asserts was the chairman of the surgery department. Plaintiff also named the University of Kansas Medical Center as a defendant.

their personal capacity because of their authority." Plaintiff alleged each of the defendants "participated" in implanting a surveillance or bugging device in his left leg during his hospital stay at the University of Kansas Medical Center Burn Unit.

In dismissing plaintiff's cause of action, Judge Elmo B. Hunter, Senior U.S. District Judge, in an Order of April 13, 1992 found, pursuant to Fed. R. Civ. P. 12(b) and 42 U.S.C. § 1983, that plaintiff's Complaint failed to state a claim upon which relief could be granted. In a footnote, Judge Hunter also indicated the court's view that venue was improper and that a § 1983 action against state agencies brought in federal court was barred by the Eleventh Amendment to the United States Constitution. Shaw did not appeal Judge Hunter's decision.

On December 31, 1992, Shaw filed a new Complaint in the United States District Court for the District of Kansas alleging again that an electronic device was implanted in his leg. Frank W. Masters, M.D., David W. Robinson, M.D., and Gene Budig, Chancellor of the University of Kansas, were the only defendants named from the original list of defendants

previously named in the Missouri action. John C. McFadden, an Associate General Counsel for the University of Kansas Medical Center, was newly added, as was Fred Allenbrand, the Sheriff of Johnson County, Kansas, who Shaw alleged used the electronic device to monitor Shaw's actions with a helicopter.

On June 25, 1993, G.T. Van Bebber, United States District Judge, granted defendants' Motions for Summary Judgment based in part on uncontroverted facts contained in defendants' Motion for Summary Judgment supported by affidavits filed by defendants. (Memorandum and Order, 6-28-93 entered on the docket 6-29-93.) The Court held defendants (1) immune from suit under the Eleventh Amendment; (2) found defendants were not directly or indirectly involved in the surgical procedures underlying this action; and (3) that the statute of limitations barred plaintiff's claim. The district court did not specifically address Shaw's contention that the statute of limitation was tolled during a period the electronic device was concealed and that the statute did not begin to run until January of 1992 when he first discovered the electronic device in his leg.

Judge Van Bebber noted in his opinion that defendant Masters retired from the practice of medicine in July, 1989, four months before Shaw was treated at the University of Kansas Medical Center. Defendant Robinson retired in 1985, four years before Shaw was admitted to the University of Kansas Medical Center.

The Court found:

1. Defendants, to the extent they are sued in their official capacity as employees or agents of the University of Kansas Medical Center, were immune.

2. To the extent defendants were sued in a personal capacity, the uncontroverted evidence was that they had no involvement, either direct or indirect, in the actions taken for or against Shaw.

3. The action arose in December, 1989, and plaintiff's claim was barred by the two-year statute of limitation.

On July 8, 1993, plaintiff filed a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). In his motion plaintiff attempted to substitute Frank Masters and David W. Robinson as defendants "in [their] individual

capacit[ies] for acts taken in [their] official capacit[ies]," and "to eliminate Defendant Fred Allenbrand as a defendant, and to substitute Roger N. Bise as a defendant instead of the sheriff." (Motion, 7-8-93, p. 1.) Plaintiff failed to file a memorandum in support of his motion as required by D. Kan. Rule 206(a) but on July 26, 1993 filed a pleading entitled "Answer." The "Answer" appears to be plaintiff's attempt to address the issues raised by his Motion to Alter or Amend Judgment.

On July 28, 1993, plaintiff filed a motion entitled "Motion, Inquiry, and Notice. Motion to Extend Time to File an Appeal Until the Motion Filed by Plaintiff in the Clerks office on July 8, 1993 Has Been Ruled on in Order that Plaintiff May Protect and Preserve Those Rights Secured and Guaranteed by the Constitution and Laws of the United States of America." The following day plaintiff filed a "Notice of Intent to File Notice of Appeal" and a "Notice of Appeal."

Plaintiff's Motions to Alter or Amend Judgment were overruled by Judge Van Bebber on August 12, 1993. On August 13, 1993 the district court issued a Minute Order denying as moot plaintiff's

Motion For an Extension of Time to File an Appeal.

On September 14, 1993, pursuant to the Notice of Jurisdictional Defect issued by the Office of the Clerk, defendants served their Memorandum Brief addressing "whether this court has jurisdiction where the notice of appeal was filed while a timely served motion for reconsideration was pending before the district court." (Notice, 8-12-93, p. 4.)

In an Order dated October 18, 1993, the Court of Appeals dismissed plaintiff's appeal (Appeal No. 93-3239) for lack of jurisdiction.

Plaintiff filed a new Notice of Appeal on September 14, 1993. Again, plaintiff appealed from the court's Order granting summary judgment.

On March 3, 1994 the United States Court of Appeals for the Tenth Circuit issued its Order and Judgment without oral argument. In its decision the court held in favor of defendants on the merits and affirmed the district court's refusal to amend, finding no abuse of discretion. Shaw v. Masters, 16 F.3d 417, unpublished (1994). The court also denied plaintiff's

motion to add and substitute defendants finding such a motion on appeal improper.

On April 18, 1994 Shaw filed a Petition for Certiorari with this Court. By letter of May 2, 1994 the clerk returned the petition to Shaw because it did not comply with the Court's rules. Shaw refiled his Petition for Writ of Certiorari sometime prior to June 21, 1994, the date received by these defendants.

On July 11, 1994 these defendants were served with a "Supplement to Petition for Certiorari."

This brief addresses both the Petition and Supplemental Petition.

ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI IS UNNECESSARY WHEN NO NEW OR NOVEL ISSUE OF CONSTITUTIONAL OR FEDERAL LAW IS PRESENTED.

Plaintiff Shaw, who appears pro se, has discussed numerous issues and theories in his Petition and Supplemental Petition.

The thrust of his complaint has been that the lower courts found named employees of the University of the University of Kansas and the University of Kansas Medical Center immune under the Eleventh Amendment to the United States Constitution. Shaw cites Hafer v. Milo, 498 U.S. 1118 (1991) for the proposition that employees of an otherwise immune state agency may be sued individually. He is correct that state officials may be sued in their individual capacity, but ignores that to establish a claim the officials must have somehow participated in the conduct he alleges caused the injury.

In order to establish a claim under 42 U.S.C. § 1983, a plaintiff must plead sufficient facts to indicate the defendant or defendants actually participated in or had knowledge of, and acquiesced in, the event forming the basis of his or her claim. Egan v. Concini, 585 F. Supp. 801, 804 (M.C. Ga. 1984); Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir.), cert. denied, 469 U.S. 845 (1984) (must show supervisory official at least implicitly authorized, approved, or knowingly acquiesced in unconstitutional conduct). In his Complaint, petitioner merely alleged defendants failed to properly investigate his complaints about the

medical treatment he received at the University of Kansas Medical Center. (Complaint, 12-31-92, ¶ 45, ¶ 67.) Petitioner's allegation is not sufficient to create personal liability under § 1983.

Likewise, plaintiff cannot assert respondeat superior or vicarious liability as a basis for alleged constitutional deprivations under § 1983. Generally, respondeat superior or vicarious liability will not support a § 1983 claim. City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989).

In his Complaint, petitioner named defendants in their personal capacities "for their official acts of misconduct." (Complaint, 12-31-92, ¶ 1.)

Defendants Masters, Robinson, Budig and McFadden filed individual affidavits which were uncontroverted by any evidence from petitioner.

Masters and Robinson are both physicians who retired prior to the time Shaw was seen by the University of Kansas Medical Center. Budig was the University of Kansas Chancellor who had absolutely no knowledge of Shaw. McFadden is an Associate General Counsel for the

University of Kansas Medical Center whose contact with Shaw was to receive his original letter complaining of his treatment.

Petitioner's failure to sue these defendants for their personal conduct was not so much a pleading error by a pro se plaintiff as an allegation correctly stating the facts. These defendants could not and should not have been sued for their individual conduct. Masters and Robinson had absolutely no contact with Shaw. Budig was simply the Chancellor of the University of Kansas, one part of which is the University of Kansas Medical Center. McFadden was an attorney at the medical center who received Shaw's complaint.

These facts do not raise questions under either the U.S. Constitution or federal law.

II. THE PETITIONER'S ALLEGED CLAIM IS BARRED BY A TWO-YEAR STATUTE OF LIMITATION.

If immunity is found, the question regarding the statute of limitations is moot.

The statute of limitations in § 1983 actions is governed by state law. Board of Regents v. Tomanio, 446 U.S. 478, 484-85 (1980). Section 1983 claims are best characterized as personal injury actions. Wilson v. Garcia, 471 U.S. at 276; Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir. 1984) aff'd, 471 U.S. 261 (1985). Accordingly, the two-year statute of limitations set forth in K.S.A. 60-513(1)(4) applies to petitioner's claim. Baker v. Kansas Board of Regents, 991 F.2d 628, 630 (1993).

Petitioner alleges the "foreign device" was placed in his leg during an operation performed on December 12, 1989. Petitioner newly asserts the claim that a radio transmitter was allegedly inserted into his brain, presumably during the operation in which he alleges the electronic device was implanted into his leg. Petitioner filed his Complaint on December 31, 1992, more than two years after his operation.

The lower court apparently rejected plaintiff's contention that the defendants concealed the electronic device, thereby tolling the statute of limitation.

CONCLUSION

Petitioner's claim, although bizarre, may very well be sincerely held by Shaw. He has not, however, brought an action that states a cause of action under 42 U.S.C. § 1983. There is no split of authority among U.S. circuit courts concerning either the immunity or statute of limitations issues, and neither present any unique issues regarding federal law. The lower courts correctly applied the law of this Court. Petitioner merely seeks to have his action reviewed by this Court. Such a review is unwarranted.

WHEREFORE, respondents pray that petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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Order and Judgment of the United States Court of Appeals, Tenth Circuit (February 7, 1994) 1a

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-3289
(D.C. No. 92-2519-GTV)
(D. Kan.)

SHERMAN L. SHAW,

Plaintiff-Appellant,

v.

FRANK W. MASTERS, Clinical Professor, et al.,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before SEYMOUR, Chief Judge, McKAY, and BALDOCK, Circuit Judges.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 22, 1993.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Sherman Shaw brought a pro se civil rights action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand claiming they deprived him of his constitutional rights in violation of 42 U.S.C. §§ 1983 and 1985. The district court granted defendants' motion for summary judgment. Rec., vol. II, doc. 38. Defendant then filed a motion to amend the judgment. Rec., vol. II, doc. 40. The district court treated Mr. Shaw's motion as a motion for reconsideration and overruled it for lack of merit. Rec., supp. vol. I, doc. 50. We affirm.

Mr. Shaw was transported to the University of Kansas Medical Center (KUMC) in November 1989 to receive treatment for severe burns he sustained as the result of a fire. While at KUMC, Mr. Shaw underwent surgery and skin grafts on his legs and thighs. He alleges that on December 12, 1989, while in surgery at KUMC, defendants

or their agents surreptitiously implanted an electronic surveillance device in his thigh for the purpose of monitoring his conversations and movements. He also alleges that defendant Allenbrand, the sheriff of Johnson County, Kansas, has used the "bugging" device in his thigh to monitor him, and has sent helicopters and agents into Kansas City, Missouri, to pursue and harass him.

In its memorandum and order, the district court considered both the facts of this case and the applicable law and granted defendants' request for summary judgment. We affirm substantially on the basis of the district court's decision. In addition, we review the district court's denial of Mr. Shaw's motion to amend for abuse of discretion. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992). The district court specifically noted that, after reviewing Mr. Shaw's motion, "it articulates nothing warranting reconsideration of the court's previous Memorandum and Order." Rec., supp. vol. I, doc. 50 at 1. Because we find no abuse of discretion, we affirm.

Finally, in an apparent attempt to continue this suit despite the district court's decision below, Mr. Shaw has filed before this court additional pro se

motions seeking to drop defendant Allenbrand from the suit and to join Robert Stephan, the Attorney General for the State of Kansas, as well as four individual members of the Kansas Surgery Association and the insurance carrier of the Kansas Surgery Association. Mr. Shaw had ample opportunity to bring such motions before the district court. Indeed, in his motion to amend, Mr. Shaw requested the substitution of certain parties, but the district court overruled Mr. Shaw's motion as meritless. It is improper to add parties on appeal and Mr. Shaw's motion is therefore denied.

The decision below is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Chief Judge